

(2018) 02 GAU CK 0089
In the Gauhati High Court
Case No : Crl Pet 54 of 2017

BINOY SHARMA

APPELLANT

Vs

NAGENDRA NATH SHARMA

RESPONDENT

Date of Decision : 09-02-2018

Acts Referred:

[Constitution of India](#), [Article 20](#) -
Protection in respect of conviction for offences
[Code of Criminal Procedure, 1973](#), [Section 482](#) -
Saving of inherent powers of High Co

Citation : (2018) 02 GAU CK 0089

Hon'ble Judges : Mir Alfaz Ali

Bench : Single Bench

Advocate : M.K. SHARMA, S.S. SAIKIA?B PATHAK

Final Decision : Disposed

Judgement

1. Aggrieved by the order dated 13.12.2016 passed by the learned JMFC, Kamrup (M) in CR Case No.929/2015, the petitioner has filed the

present petition under Section 482 Cr.P.C., praying for setting-aside the impugned order and also for direction to issue notice for production of the original documents.

2. The petitioner and the respondent are brothers. The petitioner owns a plot of land at village Kachari Garigaon in the district of Kamrup (M),

Assam. As the petitioner resides in his native place at North Lakhimpur, he entrusted the respondent being his brother to look after the said

property. Taking advantage of looking after the property, the respondent prepared a forged gift deed in respect of the said land of the petitioner in

favour of the respondent forging the signature of the petitioner and therefore, the petitioner lodged a complaint against the respondent which was

pending trial before the JMFC, Kamrup (M). In the said criminal proceeding, the petitioner filed an application under Section 66 of the Evidence

Act, 1872 praying for issuing notice to the respondents to produce the original gift deed which was in possession of the respondent and also the

sub-registrar for production of original thumb impression book, which contained the thumb impression of the parties to the deed.

3. Learned JMFC by the impugned order rejected the application of the petitioner citing basically two grounds, firstly, such direction would

amount to testimonial compulsion in violation of Article 20 of the Constitution of India so far as the accused/respondent is concerned. Learned

JMFC also observed that the petition was filed after framing of charge and in course of evidence and the petitioner did not produce any certified

copy of the document, production of which was sought for. Since the petitioner did not produce the certified copy and failed to show any reason

for calling the documents, learned magistrate declined to allow the prayer, so far the respondent is concerned. With regard to the prayer for notice

to produce thumb impression book, learned Magistrate observed that there was no evidence with regard to alleged forgery and therefore, learned

Magistrate did not consider it proper to issue notice to the Sub-Registrar for production of the thumb impression registrar.

4. Section 64 of the Evidence Act provides that "Documents must be proved by primary evidence except in the cases hereinafter mentioned.

5. Section 65 of the Evidence Act lays down the circumstance, under which, a party can adduce secondary evidence, which reads as under:

65. Cases in which secondary evidence relating to documents may be given.? Secondary evidence may be given of the existence,

condition, or contents of a document in the following cases:-

(a) When the original is shown or appears to be in the possession or power? of the person against whom the document is sought to

be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it,

and when, after the notice mentioned in section 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it

is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not

arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in 1[India] to be

given in evidence²; 1[India] to be given in evidence²;

(g) when the originals consists of numerous accounts or other documents which cannot conveniently be examined in Court, and the

fact to be proved is the general result of the whole collection. In cases (a), (c) and (d), any secondary evidence of the contents of the

document is admissible. In case (b), the written admission is admissible. In case (e) or (f), a certified copy of the document, but no

other kind of secondary evidence, is admissible. In case

(g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the

examination of such documents.

6. Section 66 of the Evidence Act provides that a party shall not be entitled to adduce secondary evidence unless the party proposing to adduce

secondary evidence gives previous notice to the party in whose possession or power the document is. Section 66 reads as under:

66. Rules as to notice to produce.?Secondary evidence of the contents of the documents referred to in section 65, clause

(a) shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose

possession or power the document is, 1[or to his attorney or pleader,] such notice to produce it as is prescribed by law; and if no

notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case: Provided that

such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case

in which the Court thinks fit to dispense with it:-

- (1) when the document to be proved is itself a notice;
- (2) when, from the nature of the case, the adverse party must know that he will be required to produce it;
- (3) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;
- (4) when the adverse party or his agent has the original in Court;
- (5) when the adverse party or his agent has admitted the loss of the document;
- (6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court.

7. Section 64 of the Evidence Act mandates that a document must be proved by a primary evidence except in the cases, where secondary

evidence is permissible. Section 65 provides the circumstance under which a party can adduce secondary evidence and Section 66 lays down

certain pre-condition required to be complied with before adducing secondary evidence of a document, which requires that before adducing

secondary evidence it is mandatory for the party, who proposes to adduce secondary evidence, to give notice requiring the person under whose

possession such document is, to produce the document. When a notice is issued to a person under Section 66 of Evidence Act for production of a

document in his possession, he shall produce the same. If it is not in his possession, he can inform that he is not in possession of such document. If

such party is exempted by any statute or law from producing the document, he can also inform the Court that he is not liable to, or he is not bound

to produce such document. Therefore, issuing a notice under Section 66 of the Evidence Act to produce a document does not mean that the

person to whom the notice is issued under Section 66 is bound to produce the document. He can produce the document in his possession and he

can also refuse, if there is reason for such refusal. Therefore, giving notice to a person under Section 66 of Evidence Act to produce a document

does not amount to testimonial compulsion, as there is option to refuse the production of the document pursuant to any notice under Section 66 of

the Evidence Act. Failure of refusal of a party, to whom notice is given under Section 66 of Evidence Act to produce any document, entitles the

party in whose instance the notice under Section 66 of the evidence Act is given, to adduce secondary evidence under Section 65 of the Evidence

Act.

8. The learned counsel rightly submitted that since the document was in possession of the petitioner being an adverse party in the proceeding, without issuing a notice under Section 66 of the Evidence Act, he could not adduce secondary evidence. Therefore, the refusal of such prayer of the petitioner to issue notice under Section 66 of the Evidence Act for production of any document, holding it to be testimonial compulsion in violation of Clause-3 of Article 20 was not proper and correct approach.

9. Learned JMFC while declining the prayer of the petitioner also held that no reason was assigned in filing the petition under Section 66 of the Evidence Act. In the petition filed by the petitioner under Section 66 of the Evidence Act the petitioner stated that the criminal case was filed for commission of offence under Sections 468/420/406 IPC alleging forgery in respect of a gift deed and production of deed was required in order to prove the signature in the said deed. It was also stated that the deed was in custody of the petitioner. Therefore, the finding of the learned trial Court that no reason was assigned for issuing any notice for production of the document in the petition appears to be perverse. Mere issuing a notice to the accused under Section 66 of the Evidence Act to produce a document does not necessarily amount to testimonial compulsion, unless such document contains any statement conveying his personal knowledge relating to the charge against him or any statement which can attribute culpability to him and he is compelled to produce the document. Be that as it may, mere production of a document for the purpose of comparing or proving any signature or thumb impression in such document, not being the statement of the accused relating to the charge against him does not hit clause 3 of Article 20 of the Constitution. In *State of Bombay Vs. Kathi Kalu Oghad* reported in AIR 1961 SC 1808, the Apex Court dealing with the question of testimonial compulsion vis-?-vis production of documents held as under:

It is well established that cl. (3) of Art 20 is directed against self-incrimination by an accused person. Self incrimination must mean conveying information based upon the personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in Court which may throw a light on any of the points in

controversy, but which do not contain any statement of the accused based on his personal knowledge. For example, the accused person may be in possession of a document which is in his writing or which contains his signature or thumb impression. The production of such a document, with a view to comparison of the writing or the signature of the impression, is not the statement of an accused person, which can be said to be of the nature of a personal testimony. When an accused person is called upon by the Court of any other authority holding an investigation to give his finger impression or signature of a specimen of his handwriting, he is not giving any testimony of the nature of a "personal testimony". The giving of a "personal testimony" must depend upon his volition. He can make any kind of statement or any refuse to make any statement. But his finger impression or his handwriting, in spite of efforts at concealing the true nature of it by dissimulation cannot change their intrinsic character. Thus, the giving of finger impressions or of specimen writing or of signatures by an accused person, though it may amount to furnishing evidence in the larger sense, is not included within the expression "to be a witness".

10 What therefore necessarily follows from the above ratio is that issuing of notice under Section 66 to produce a document for purpose of comparing signature or thumb impression does not amount to testimonial compulsion. The issue of notice to the Sub- Registrar for production of thumb impression register, if considered necessary for proper adjudication of the case, there is no bar in issuing notice to the Sub-Registrar for production of the concerned register.

11. With the above observation, the impugned order passed by the learned Magistrate is set-aside and the matter is remitted back to the learned trial Court to consider the application filed by the petitioner under Section 66 of the Evidence Act for issuing notice to produce the document, afresh in the light of the observations made herein above.

12. The revision petition is disposed of accordingly.

13. Send back the LCR.